Supreme Court of the United States.

In Re ALEXANDER McKENZIE, PETITIONER.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now come Jeremiah M. Wilson, Thomas J. Geary, C. A. Severance, and F. B. Kellogg, of counsel for Alexander McKenzie, the petitioner, and move this honorable court for leave to file the petition herewith exhibited of the said Alexander McKenzie for a writ of *habeas corpus* and a writ of certiorari.

JEREMIAH M. WILSON,
THOS. J. GEARY,
C. A. SEVERANCE,
F. B. KELLOGG,
Of Counsel for Petitioner.

[Endorsed:] In the Supreme Court of the United States. *In re* Alexander McKenzie, petitioner.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No......

IN RE ALEXANDER MCKENZIE, PETITIONER.

BRIEF ON PETITION FOR HABEAS CORPUS.

J. M. WILSON,
T. J. GEARY,
C. A. SEVERANCE,
F. B. KELLOGG,
Attorneys for Petitioner.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 2-26-'01

Supreme Court of the United States

OCTOBER TERM, 1900.

No. .....

IN RE ALEXANDER McKENZIE, PETITIONER.

BRIEF ON PETITION FOR HABEAS CORPUS.

This is an application for a writ of *habeas corpus*, together with a writ of certiorari and such other remedy as to the court may seem proper, based upon the following facts set forth in the petition:

The petitioner, McKenzie, was, on July 23, 1900, appointed as receiver of certain mines and mining property near Nome, Alaska, in two certain causes then pending in the district court for the district of Alaska, one of said causes, as set forth in the petition, being entitled Melsing *vs.* Tornanses *et al.*, and the other being entitled Rogers *vs.* Kjellman *et al.*

The order appointing said McKenzie as receiver in the case of Melsing *vs.* Tornanses *et al.* is to be found in Exhibit B, page 22, attached to the petition. This order of appoint-

ment was made on July 23, 1900, and on the following day the defendants appeared and moved to set aside the order, which motion was denied; and thereafter, on the 29th day of August, 1900, a petition for an appeal from said order so appointing said McKenzie as receiver, as aforesaid, in each of said two cases was presented to the Hon. W. W. Morrow, circuit court judge, at chambers, in the city of San Francisco. Said judge thereupon made an order allowing said appeal, and he approved a supersedeas bond then presented to him, and signed a citation to the plaintiff, which said papers will be found on pages 23 to 33 of Exhibit C.

The petition and order, together with the bond and its approval, were thereupon filed in the office of the clerk of the United States circuit court of appeals, at San Francisco, and have since remained on file in said court.

On the same day that said appeals were allowed the said judge, Hon. W. W. Morrow, made an order in each of said two cases directing the clerk of the circuit court of appeals to issue a writ of supersedeas in the form presented to said judge by the counsel for said appellant (Exhibit "A," p. 16). This order was likewise filed in the office of the clerk of the circuit court of appeals, and neither said order nor any copy thereof was ever filed in the office of the clerk of the district court for the district of Alaska, or called to the attention of the petitioner herein, until after his arrest. The clerk of the circuit court of appeals thereupon assumed to issue, and did sign and seal, papers purporting to be writs of supersedeas, dated on said August 29 (Exhibit "A," pp. 16 and 17); which writs, among other things, commanded said receiver to deliver to the defendants in said two causes all the property that had come into his hands by virtue of his said office.

These writs were sent to Alaska for service, and were served upon the petitioner on the 14th day of September, 1900, and on the same day the citations above referred to were served upon counsel for the appellees, and on said day, and after demand had been made upon petitioner for the surrender of said property to the defendants, were filed in the office of the clerk of said district court. No other original papers upon said appeal were at any time filed with the clerk of the district court for Alaska, but copies of the petition and order allowing the appeal and of the bond and its approval, certified by the clerk of the United States circuit court of appeals for the ninth circuit, were filed in the office of the clerk of the district court.

Upon the demand being so made upon him, the petitioner requested permission to advise with his counsel as to his duty in the premises, and upon the following day, to wit, September 15, and before his counsel had completed his investigation of the matter, the judge of the district court for Alaska made an order requiring the United States marshal for said district to take into his possession and hold, subject to the further order of the court, all the gold that had theretofore been extracted from said mines, and which had, pursuant to orders previously made, been deposited in safe-deposit vaults at Nome. The petitioner, on the 14th of September, shortly after being served with said papers purporting to be writs of supersedeas, stopped all operations at said mines and discharged the laborers employed in mining therein, and the appellants entered into possession of the mines and have since remained in possession, undisturbed by petitioner. On the 17th of September affidavits were made charging the petitioner with disobedience to said writs. The same were sent

to San Francisco and presented to the United States circuit court of appeals on the 2d day of October, and thereupon said court made identical orders in said two causes, among other things requiring said petitioner to show cause on November 5, at San Francisco, why he should not be punished for contempt of court in failing to obey the injunctions contained in said writs of supersedeas (Exhibit "A," pp. 7 to 20). The petitioner was thereupon arrested brought to the city of San Francisco by a marshal who was sent out to Alaska by the court of appeals, and upon being brought into court, after certain continuances, on January 14, 1901, a plea to the jurisdiction was filed by petitioner in each of said two causes, which said pleas were overruled. A copy of said plea will be found on pp. 35 to 37, Exhibit D, attached to the petition herein.

The petitioner thereupon filed answers in said causes which were substantially identical. A copy of the answer in said case of Melsing *vs.* Tornanses appears on pages 38 to 41, Exhibit D, attached to the petition. Evidence by way of affidavits and parol testimony was introduced, all of which is set forth in Exhibit D, attached to said petition. Thereupon, after considering said matter, said court of appeals, on the 11th day of February, 1901, adjudged the petitioner guilty of contempt in each of said causes in failing to obey the said writs of supersedeas issued by the clerk of the court of appeals on the 29th day of August, 1900, and sentenced him to imprisonment in the county jail for the county of Alameda, California, for the period of six months in each case, the term of imprisonment in said case of Melsing *vs.* Tornanses to commence at

once, and in said other cause immediately upon the expiration of the said period of six months. Petitioner was at once taken into custody and is now confined in said jail in the custody of Oscar L. Rogers, sheriff of said Alameda county, under the aforesaid judgment in the case of Melsing *vs.* Tornanses, a copy of which judgment is attached to the petition herein (Exhibit D, pp. 105 to 122).

Petitioner claims that he is illegally restrained of his liberty, for the reason that the said writs of supersedeas are void, and that the court of appeals neither at the time the said writs were issued, nor at any other time, had jurisdiction of the said appeals so attempted to be taken, and that there was no legal authority for the issuance of said writs of supersedeas, and the petitioner makes the following suggestions on that behalf:

I.

The writ of supersedeas, for the violation of which petitioner is imprisoned, was and is absolutely void, for the following reasons:

(*a.*) At the time the same was issued, to wit, on the 29th day of August, 1900, the circuit court of appeals was absolutely without jurisdiction of the cause in which said writ was issued, for at that time no appeal had been taken in said cause to the said circuit court of appeals.

(*b.*) That the clerk of said court was without authority to issue and seal said writ of supersedeas except when so ordered by said court of appeals, acting as a court. The writ in this case was issued solely by direction of the Hon. W. W. Morrow, circuit judge, and was never directed to be issued by the circuit court of appeals for the ninth circuit.

II.

(*a.*) Because there is no provision of law authorizing an appeal from an interlocutory order, made by the district court of Alaska, appointing a receiver, or from an order refusing to discharge a receiver, and the order from which Judge Morrow allowed an appeal was an interlocutory order appointing a receiver, and not an interlocutory order granting an injunction or refusing to dissolve an injunction, and in an injunction case the bond must be approved by the lower court. (See Rule 13, sub 2, Rules Circuit Court of Appeals.)

(*b.*) The powers of the circuit court of appeals for the ninth circuit in allowing appeals from interlocutory orders made by the district court of Alaska are defined specifically by the Alaskan Code, so called, but even conceding the court of appeals act (as amended June 5, 1900) to be applicable to appeals from the district court of Alaska, then the appeal nevertheless, must fail for the reason that the same was not taken in the time allowed by law. The order in question having been made on July 23 and the citation signed by Judge Morrow (which was the only original paper ever filed in the district court of Alaska) not having been filed in said court until September 14, 1900, more than thirty days after the order complained of had been made, the appeal was taken too late.

III.

Neither the judge of the circuit court of appeals for the ninth circuit nor the court itself had any power to order or allow said writ of supersedeas, for the reason that, conceding for

the purpose of the argument only that the order in question is an injunctional order, as claimed, the power to allow supersedeas in such cases is, by law, vested exclusively in the district court of Alaska.

IV.

No appeal was ever taken in these causes for the reason that neither the petition for an appeal nor the order allowing the same nor the bond upon appeal nor the approval thereof was at any time deposited or filed with the clerk of the district court for the district of Alaska.

V.

The records in the causes in which such appeals were allowed were not lodged in the said circuit court of appeals or docketed in said court within the time allowed by Rule 16 of the circuit court of appeals, nor was the time to docket the same extended during said period.

VI.

Even conceding that Judge Morrow had the right to allow an appeal from the order appointing a receiver, made by the district court of Alaska, to approve a bond, and direct that said order should be superseded, still the writ issued by the clerk under his authority, in so far as it directed return of the proceeds of the property, was in excess of his authority, as he could only direct a stay of proceedings under the order appointing a receiver, and not the return of the property, which, in effect, operated to reverse the order of the district court of Alaska.

VII.

It will undoubtedly be conceded that, if the writ of supersedeas was void for any of the reasons above stated, petitioner could not be punished for its violation.

We will take up these propositions in their order:

I.

(*a.*) At the time the writ of supersedeas was issued, to wit, on the 29th day of August, 1900, the circuit court of appeals was absolutely without jurisdiction of the cause in which said writ was issued, for at that time no appeal had been taken in said case to the said circuit court of appeals.

The authorities are uniform that an appeal is not "taken" simply on an allowance of the same by a judge, or by the taking and approving of security and the signing of a citation. It is only "taken" when the allowance is filed in the office of the clerk of the court in which the judgment or order complained of was made—that is, in this case, in the office of the clerk of the district court for the district of Alaska.

The circuit judge in allowing an appeal from the district court of Alaska does not act as a member of the court of appeals, but only as an officer authorized by law to allow such appeal. He has no other or greater functions than the district judge for the district of Alaska, who may likewise allow an appeal. The petition and order allowing the appeal and the appeal bond, with its approval, were on the 29th of August lodged in the office of the clerk of the court

of appeals. This was clearly ineffectual and not justified under the statute or decisions.

Credit Company *vs.* Arkansas Central R'y Co., 128 U. S., 258.
Mussina *vs.* Cavazos, 6 Wall., 355.
Scarborough *vs.* Pargoud, 108 U. S., 567.
Polleys *vs.* Black River Co., 113 U. S., 81.
Brandies *vs.* Cochrane, 105 U. S., 262.
Farrar *vs.* Churchill, 135 U. S., 612.
Foster *vs.* Kansas, 112 U. S., 201.
Fowler *vs.* Hamill, 139 U. S., 550.
Cincinnati Safe & Lock Co. *vs.* Grand Rapids Safety Deposit Co., 146 U. S., 54.
Aspen Company *vs.* Billings, 150 U. S., 31.
Harkrader *vs.* Wadley, 172 U. S., 163.
United States *vs.* Baxter, 51 F. R., 624.
City of Waxahachie *vs.* Coler, 92 F. R., 284.
Threadgill *vs.* Platt, 71 F. R., 1.
Stevens *vs.* Clark, 62 F. R., 324.
In re Goodman, 101 F. R., 920.

In Credit Co. *vs.* Arkansas Central R'y Co. (*supra*) the court had under consideration an appeal. On the 22d of January, 1883, a final decree was entered dismissing the bill for want of equity. On the 22d of January, 1885, exactly two years after the entry of the decree, a petition for an appeal was presented by the solicitor for the complainant to Mr. Justice Miller, and allowed. At the same time Justice Miller signed the citation and approved the bond. These papers were filed with the clerk of the circuit

court on the 27th day of January, 1885, being five days after the two years from the date of the final decree. After quoting the language of Chief Justice Taney in Brooks *vs.* Norris (11 Howard, 203), where he said:

"It is the filing of the writ that removes the record from the inferior to the appellate court, and the period of limitation prescribed by the act of Congress must be calculated accordingly"—

The court proceeds as follows:

"The same rule is applicable to appeals as to writs of error. Section 1012 of the Revised Statutes declares that appeals from the circuit courts and district courts acting as a circuit court and from district courts in prize cases shall be subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of error.. * * * An appeal cannot be said to be 'taken' any more than a writ of error can be said to be 'brought' until it is in some way presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause and making it its duty to send it to the appellate court. This is done by filing the papers, viz., the petition and allowance of appeal (where there is such petition and allowance), the appeal bond and the citation."

In Brandies *vs.* Cochrane (*supra*) it was held that, in the absence of a petition for an appeal and allowance, the filing of the appeal bond, duly approved by a justice of this court, was sufficient evidence of allowance of an appeal, and established compliance with the law requiring the appeal to be filed in the clerk's office.

In Farrar *vs.* Churchill (*supra*) this court had under consideration a cross-appeal, and said:

"And so, when a cross-appeal is allowed by a justice of this court the petition and order of allowance must be filed in the court below, in order to the due taking of the cross-appeal under the statute."

The rule in Credit Co. *vs.* Arkansas Central R'y Co. (*supra*) has been approved and applied by this court in the cases of Fowler *vs.* Hamill (*supra*), Cincinnati Safe and Lock Co. *vs.* Grand Rapids Safety Deposit Co. (*supra*), and in the very late case of Harkrader *vs.* Wadley, 172 U. S., 163, and has been repeatedly followed by the various courts of appeals of the country in the cases we have cited, the last one being in the case of *In re* Goodman, 101 F. R., 920, decided by the circuit court of appeals for the seventh circuit in May, 1900, where an appeal was dismissed by reason of the fact that the petition and order allowing the appeal were not filed in the office of the clerk in the court below until the day after the time for appeal had expired.

In Farmers' Loan & Trust Co. *vs.* Chicago & N. P. R. R. Co., 73 F. R., 316, the circuit court of appeals of the seventh circuit says:

"The citation is intended only for the purpose of notice, and is not jurisdictional, and may be waived or substituted by proof of other equivalent notice," citing several decisions from this court.

The circuit court of appeals for the ninth circuit takes the position that this appeal was "taken" within the meaning of the statute by reason of the filing of the citation in the office of the clerk of the district court for Alaska on the 14th day of September, relying upon the decision of this court in Brown *vs.* McConnell, 124 U. S., 489.

With reference to that case, it is sufficient to say, first, that it has never been referred to as an authority in any subsequent decision of this court except in the case in the same volume immediately following it, and, second, it was decided upon the particular facts of the case, which were that there was in fact no petition and order of allowance of the appeal, and the court, for that reason, said that the citation was intended to take the place of such order of allowance and would be construed to be the allowance of the appeal.

In the Credit Company case, however, in 128 U. S. (*supra*), the court expressly holds that, where there is a petition and allowance, it must be filed with the clerk of the court below.

In this case there was a petition presented to Judge Morrow, and upon that petition he made an order allowing the appeal; he also took the security and approved it, and the citation itself refers to the petition and order allowing an appeal showing that the citation was not intended to take their place. Therefore the case is not within the exception noted in the case of Brown *vs.* McConnell, which, as we have said, has never been mentioned as an authority by this court since it was decided. Therefore the circuit court of appeals never acquired jurisdiction of the case, and hence the writ of supersedeas is clearly void.

(*b.*) That the clerk of said court was without authority to issue and seal said writ of supersedeas except when so ordered by said court of appeals, acting as a court. The writ in this case was issued solely by direction of the Honorable W. W. Morrow, circuit judge, and was never directed to be issued by the circuit court of appeals for the ninth circuit.

On the 29th of August and until the 14th of September, 1900, no paper whatever relating to an appeal had been filed in the office of the clerk of the district court for the district of Alaska. Therefore, even conceding that the filing of citation would give the court of appeals jurisdiction, that jurisdiction did not attach until September 14. The court of appeals was not in session on the 29th of August. The writ of supersedeas was issued only upon the order of a single circuit judge, in vacation, and said judge had no authority to direct the issuance of such writ. The court below, in its decision, claims that a single judge has such authority, basing its decision upon the case of *In re* Claasen, 140 U. S., 200, and rule 36 of this court, which provides that at the time of allowance of a writ of error a justice of the court may allow a supersedeas. The difficulty with the position of the court below is that it fails to recognize the distinction between an order of a single judge who allows an appeal that the writ of error or the allowance of an appeal may operate as a supersedeas and the right of such single judge to cause to be issued a writ of supersedeas out of and under the seal of the court.

In the case of *In re* Claasen this court used the following language:

"That this court as a court has power to issue a writ of supersedeas under section 716 of the Revised Statutes is quite clear, for that section gives it power to issue all writs not specifically provided for by statute which may be necessary for the exercise of its jurisdiction and agreeable to the usages and principles of law."

In Hudson *vs.* Parker, 156 U. S., 277, the court again says that the court as a court has authority to grant a supersedeas

under section 716, and a single judge has authority to grant supersedeas under section 1000. Section 716 refers specifically to writs; section 1000 does not in any way refer to writs. In the Claasen case and in Hudson *vs.* Parker the justice who allowed the writs of error made an endorsement that such writs of error should operate as supersedeas. That was proper under rule 36 and under the statute, but it falls far short of holding that a single judge out of term can order the clerk of the appellate court to issue a writ of that court which can only be issued by the court as a court. Section 716 provides only for the issuance of writs by the court; section 717, immediately following it, provides that writs of *ne exeat* may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court, and by any circuit justice or circuit judge in cases where they might be granted by the circuit court of which he is a judge. Section 718 provides that whenever notice is given of a motion for injunction out of a circuit court or district court the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the acts sought to be enjoined until decision upon the motion. Section 719 provides that writs of injunction may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court, and by any judge of a circuit court in cases where they might be granted by such court.

It is entirely clear that where power is given to the court as a court, as in section 716, it was not the intention of Congress to vest the power of the court in a single judge or justice of that court. If it had been so intended there would have been no necessity of the express provisions in the three

sections following section 716, granting such powers to the justices of the Supreme Court and the circuit court judges in those specific cases.

If Judge Morrow, as a single judge, who may or may not be acting as a judge of the court of appeals, can set in motion the machinery of the court of appeals, and direct its clerk to issue a writ which the statute says can be directed only by the court, as a court, then any other judge authorized to allow an appeal from the district court of Alaska can make the same direction to the clerk of the court of appeals. Judge Morrow's powers are no greater than are the powers of a district judge of the district court of Alaska in allowing appeals out of term. If Judge Morrow can direct the clerk of the court of appeals to issue a writ of that court in a cause of which it has not acquired jurisdiction, a judge of the district court of Alaska could likewise do the same thing, although he could, under no circumstances, be or become a member of such court of appeals.

This court being governed by the same rules of practice as the circuit court of appeals for the ninth circuit, the judge of the district court of Alaska, from whose court appeals in certain causes lie direct to this court, might make an order at the time he allowed an appeal and send it to the clerk of this court, at Washington, directing the clerk to issue writs of supersedeas, which writs might command the doing of acts most objectionable to this court. If the authority and jurisdiction be conceded, then writs of the Supreme Court of the United States may be directed by the judges of any inferior courts, from whose courts appeals lie to the Supreme Court.

It will be observed that, under sections 717 and 718 and

719, where power is expressly given to the various judges to cause writs to be issued from their courts, that authority is only given to justices of the Supreme Court as to writs issuing out of the Supreme Court and as to the circuit court justices or circuit judge as to writs issuing out of the circuit court.

The order that Judge Morrow was authorized to make in this case, allowing an appeal or granting a supersedeas, was an order in the lower court. The statute permits that order to be made by any one of the various judges of the lower or appellate court for convenience of parties, where, for any reason, it was not convenient or possible to pray an appeal in open court in the court below.

In Hudson *v.* Parker (*supra*) it is clearly laid down that the power of a judge to grant supersedeas is given by section 1000, and not by section 716; and this court has always held that its power to issue writs in aid of its jurisdiction, and for the protection of its jurisdiction, was conferred by section 716.

If Judge Morrow, in allowing an appeal, had simply approved the security that had been filed in the court below, it would have operated as a supersedeas and stayed all proceedings. After this appeal was thus taken (in the language of the decisions) and the case was transferred to the appellate court, then that court had authority, for the protection of its jurisdiction, to issue all proper writs; but the writ in question was absolutely void when issued, and no subsequent action could make it valid, as at that time no appeal had been taken.

II.

(*a.*) Because there is no provision of law authorizing an appeal from an interlocutory order made by the district court of Alaska appointing a receiver, or from an order refusing to discharge a receiver, and the order from which Judge Morrow allowed an appeal was an interlocutory order appointing a receiver and not an interlocutory order granting an injunction or refusing to dissolve an injunction; and in an injunction case the bond must be approved by the lower court. (See Rule 13, sub. 2, Rules Circuit Court of Appeals.)

The jurisdiction of the court of appeals of the ninth circuit to entertain appeals from and review orders, judgments, and decrees in causes commenced in the district court of Alaska is defined and limited, and solely dependent upon the provisions of chapter 51, part 4, of Carter's Annotated Alaska Code, p. 252. Section 507 of said Code is as follows:

"An appeal may be taken to the circuit court of appeals from any interlocutory order (granting or dissolving an injunction), refusing to grant or dissolve an injunction made or rendered in any cause pending before the district court, within sixty days after the entry of such interlocutory order. The proceedings in other respects in the district courts in the cause in which such interlocutory order was made shall not be stayed during the pendency of such appeal unless otherwise ordered by the district court."

On the same day that the Alaska Code was approved, to wit, June 6, 1900, an act amending section 7 of the court of appeals act was approved, which allowed an appeal from

an interlocutory order made by a circuit court appointing a receiver.

In the case of The Steamer *Coquitlam vs.* United States, 163 U. S., 346, the court held that the circuit court of appeals could not review the final judgments or decrees of the Alaska court by virtue of its appellate jurisdiction over the district courts mentioned in the act of March 3, 1891, and the appellate jurisdiction exercised by the court of appeals of the ninth circuit over judgments and decrees of the Alaska court was only exercised by virtue of the general authority conferred by the fifteenth section of the act of 1891 to review the judgments of the supreme court of any territory assigned to such circuit.

Congress could not have intended the amendment to the court of appeals act of June 6, 1900, to apply to Alaska, because it on the same day passed an act making a code for Alaska, excluding the right of appeal from orders appointing receivers. It is a familiar rule of law that a statute relating to a special subject will prevail over a general statute. The amendment to the court of appeals act, allowing such appeal from an order appointing a receiver, was regarded as necessary by reason of the decision of this court in the case of Highland Avenue & Belt Railway *vs.* Columbia Equipment Co., 168 U. S., 627. (See also Florida Construction Co. *vs.* Young, 59 F. R., 721, and Jack *vs.* Cunningham, 102 F. R., 210.)

Without quoting at length from the decisions, it is sufficient to say that, in the Highland Avenue case, this court held that, although an order appointing a receiver contained an injunctional order, as in the case at bar, requiring the defendant to turn over to the receiver the property for which

he was appointed receiver, that that was only incidental and ancillary to the receivership, and that no appeal would lie from that order. That case seems conclusive upon the question that, under the terms of the Alaska Code, no such appeal is permitted.

(*b.*) The powers of the circuit court of appeals for the ninth circuit, in allowing appeals from interlocutory orders made by the district court for the district of Alaska, are defined specifically by the Alaska Code, so called; but, even conceding the court of appeals act (as amended June 6, 1900) to be applicable to appeals from the district court of Alaska, then the appeal nevertheless must fall for the reason that the same was not taken in the time allowed by law. The order in question having been made on July 23, and the citation signed by Judge Morrow (which was the only original paper ever filed in the district court of Alaska) not having been filed in said court until September 14, 1900, more than thirty days after the order complained of had been made, the appeal was taken too late.

If it be contended that the court of appeals act, as amended, is in *pari materia* with the Alaska Code, and that the power to allow appeals from the district court of Alaska exists also by virtue of the court of appeals act, then this appeal must fall for the reason that the order appealed from was made on the 23d day of July, and no paper relating to the appeal was filed in the office of the clerk of the district court for Alaska until September 14, 1900, much more than thirty days after the date of the order. It will be remembered that the Alaska Code gives sixty days in which to take an appeal from such interlocutory orders as are ap-

pealable under that code, but, if the court of appeals act is the foundation of the jurisdiction of the court of appeals, then its limitation must go with it, and the appeal will fail.

It is clear that this order is not a final order in any sense, although that is suggested by the court of appeals in its decision for the first time. That court had evidently come to the conclusion that it could not sustain its jurisdiction upon the ground originally asserted, to wit, that the order was an injunctional order, and therefore changes its base in its decision upon the contempt matter, and endeavors to justify its action upon the ground that the order is a final order.

An order appointing a receiver is certainly not a final order; it affects no man's property; it merely puts an impartial person in possession of the property, to hold it for the court until the true owner shall be determined by the judgment. The Alaska Code expressly authorizes the appointment of a receiver in an action of this character. See section —.

The Alaska Code also particularly defines a judgment. Section 234, chapter 24, part 4, of the code is as follows:

"A judgment is a final determination of the rights of the parties in the action."

III.

Neither the judge of the circuit court of appeals for the ninth circuit nor the court itself had any power to order or allow said writ of supersedeas, for the reason that, conceding, for the purpose of the argument only, that the order in question is an injunctional order, as claimed, the power to

allow supersedeas in such cases is, by law, vested exclusively in the district court of Alaska.

The latter part of section 507 of the Alaska Code, which section refers to appeals from interlocutory orders, provides:

"The proceedings in other respects in the district court in the cause in which such interlocutory order was made shall not be stayed during the pendency of such appeal, unless otherwise ordered by the district court."

That section was clearly intended to leave the matter of staying proceedings entirely in the hands of the court which made the injunctional order, and is in harmony with subdivision 2, rule 13, of the rules of the circuit court of appeals, which rules were made by this court for the government of the circuit court of appeals. It is provided by that rule that in cases of injunction a bond shall be approved by the court which granted the injunction. The reasons which actuated this court in making that rule are obvious. The necessity for restraining orders and injunctions is dependent upon local conditions, with which appellate courts, sitting thousands of miles from the place where such injunctions are granted, must necessarily be unfamiliar. Great hardships might arise if courts of appeals were permitted to suspend the operation of injunctional orders during the hearing. In the present case, for instance, the bill of complaint alleges that the defendants are exhausting the mines, taking the property out of the jurisdiction, and that they are insolvent and irresponsible. For the purpose of having that property in its control, so that the person eventually found entitled to it will have it preserved intact, the district court of Alaska appoints a receiver, which operates to prevent the looting of

the property by the defendants, who, the plaintiff says, have no right to the same. To permit a judge or a court unfamiliar with the situation to approve a bond in such cases was regarded as in violation of sound policy, and for that reason this court made the rule that it did for the government of the courts of appeals, and the Alaska Code contains the provision that it does for the same considerations appealed to Congress in passing that code.

Section 7 of the act of March 3, 1891, constituting United States circuit courts of appeals, contains the same provision with reference to staying proceedings as is contained in the Alaska Code. That section, after providing for appeals from interlocutory orders granting or denying an injunction, proceeds:

"Provided that the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court, and the proceedings in other respects in the court below shall not be stayed, unless otherwise ordered by that court during the pendency of such appeal."

It was held by this court, in the case of Haberman Mfg. Co., petitioner, 147 U. S., 525, that this provision left the matter of granting a stay pending an appeal in the discretion of the trial court. It was argued by counsel in that case that the expression that "the proceedings in other respects" should not be stayed had reference to other proceedings in the case outside of the injunctional order, and therefore the statute, by implication, meant that the proceedings on the injunctional order should be stayed. But this court overruled that contention.

See also Leonard *vs.* Ozark Land Company, 115 U. S., 465,

where it was decided that injunctions ordered upon final decree are not affected by an appeal, and that under equity rule 93 the judge in the court below is empowered to suspend or modify the injunction pending the appeal, and upon such terms as may be considered proper.

IV.

No appeal was ever taken in these causes for the reason that neither the petition for an appeal, nor the order allowing the same, nor the bond upon appeal, nor the approval thereof was at any time deposited or filed with the clerk of the district court for the district of Alaska.

We will not further discuss this matter, as it is embraced in the discussion of the first subdivision of our first proposition, except to add that the case of Foster *vs.* Kansas, 112 U. S., 201, which was likewise a contempt case, shows with what strictness the rule is applied, that, until the writ of error or the order allowing the appeal is lodged with the clerk of the court below, the jurisdiction of that court is unaffected, and the jurisdiction of the appellate court does not attach. There both parties in Kansas were advised by wire that a supersedeas had been allowed in Washington. The Kansas court, however, acted irrespective of this notice so conveyed, and this court held that such action was entirely lawful, and that until the cause was removed by lodging the papers in the lower court there was no inhibition upon that court preventing it from acting as though no appeal had been applied for. This court also adopted the rule we contend for in *Ex parte* Ralston, 119 U. S., 613, to which case we particularly call attention.

V.

The records in the causes in which such appeals were allowed were not lodged in the said circuit court of appeals or docketed in said court within the time allowed by Rule 16 of the circuit court of appeals, nor was the time to docket the same extended during said period.

The citation was returnable in thirty days from the 29th of August. The cause was not docketed within that time, and could not thereafter be docketed, unless the court of appeals, upon application properly made, within that period, extended the time. Therefore, when the affidavits were filed charging the petitioner with having violated the writ of supersedeas, the cause in which such writ purported to be issued was not pending in the circuit court of appeals; that court had no jurisdiction over the matter, and the attempt to vest jurisdiction in that court had lapsed by reason of the failure of counsel taking the appeal to perfect the same. In passing, it may be remarked that there was probably never a case in which all rules for taking and perfecting appeals were so entirely violated as in this case. The order allowing the appeal was entitled in the circuit court of appeals instead of the Alaska court. It was filed with the clerk of the court of appeals, who had no authority to receive the same. The petition was likewise so entitled and filed; the bond and its approval were also so entitled and filed in the court of appeals, and the order allowing the supersedeas, signed by Judge Morrow, was filed with the clerk of the court of appeals. This clerk had no authority to certify to them and make his certified copies of any value or effect

The certified copy to be used in lieu of the original must be certified by an officer, who is the lawful custodian of the original; That proposition is clearly elementary.

VI.

Even conceding that Judge Morrow had the right to allow an appeal from the order appointing a receiver, made by the district court of Alaska, to approve a bond, and direct that said order should be superseded, still the writ issued by the clerk, under his authority, in so far as it directed return of the proceeds of the property, was in excess of his authority, as he could only direct a stay of proceedings under the order appointing a receiver, and not the return of the property, which, in effect, operated to reverse the order of the district court of Alaska.

Goddard *vs.* Ordway, 94 U. S., 672.
Hovey *vs.* McDonald, 109 U. S., 150.
Slaughter-house Cases, 10 Wall., 273.
Staffords *vs.* King, 90 F. R., 136.
Schenck *vs.* Peay, 1 Dill., 267.
Beach on Receivers, sec. 235.
Knox *vs.* Harshman, 132 U. S., 16.
Hogan *vs.* Ross, 11 How., 294.
Kitchen *vs.* Randolph, 93 U. S., 86.
Sage *vs.* Central Railway Co., 93 U. S., 412.
Grant *vs.* Phœnix Mutual Life Insurance Co., 121 U. S., 118.
Boyle *vs.* Zacharie and Turner, 6 Pet., 648.

The Federal courts are ruled in such matters entirely by statute. Their sole authority to issue the writ of supersedeas must be traced to a general provision in the original judiciary act of 1789, which has been carried over into the Revised Statutes of 1878, as section 716. The provisions of this section were extended to the circuit court of appeals by section 12 of the act of March 3, 1891, which is as follows:

"That the circuit court of appeals shall have the powers specified in section 716 of the Revised Statutes of the United States."

Section 508 of the Alaska Code is as follows:

"All provisions of law now in force regulating the procedure and practice in cases brought by appeal or writ of error to the Supreme Court of the United States, or to the United States circuit court of appeals for the ninth circuit, except in so far as the same may be inconsistent with any provision of this act, shall regulate the procedure and practice in cases brought to the courts respectively from the district court for the district of Alaska."

From the acts above stated the circuit court of appeals must derive its jurisdiction, if any it has, to issue the writ involved in this case.

See authorities above cited; also—

Hardeman *vs.* Anderson, 4 How., 640.

Ex parte M. & N. R'y Co., pet., 5 Wall., 188.

This court has had occasion many times to call attention to the true course of procedure with reference to supersedeas. It has invariably acted upon the theory that this writ is not to be used as a weapon in the hand of a litigant, but is to be employed by the court only when necessary to

shield the jurisdiction which it has already assumed and acquired. This court has refused, after appeal has been taken, to interfere by supersedeas with the lower court, where there has been no intention to deny or attack its jurisdiction. Thus the lower court has been permitted to proceed and issue orders to its receiver looking to the preservation of the property in his hands, and this even where the proper steps to enable the writ of error to operate as a supersedeas had been taken.

Grant *vs.* Phœnix Mutual Ins. Co. (*supra*).

Goddard *vs.* Ordway (*supra*).

In the latter case the court said:

"A supersedeas upon the appeal of a suit in equity operates to stay the execution of the decree appealed from. * * * A supersedeas is not obtained by virtue of any process issued by this court, but it follows as a matter of law from a compliance by the appellant with the provisions of the act of Congress in that behalf. We are not required, therefore, to issue any writ to perfect the right of a party to that which the law has given him; but if the court below is proceeding, through mistake or otherwise, to execute its judgment or decree notwithstanding the supersedeas, we may, under sect. 716, Rev. Stat., issue an appropriate writ to restrain that action, for it would be 'a writ necessary for the exercise of our jurisdiction.'"

In Boyle *vs.* Zacharie and Turner (*supra*), the court said:

"But if the injunction could be admitted to operate as a supersedeas at law under any circumstances in the courts of the United States, there would yet remain a decisive objection against its application in the present case. Nothing is

better settled at the common law than the doctrine that a supersedeas in order to stay proceedings on an execution must come before there is a levy made under the execution, for if it comes afterwards the sheriff is at liberty to proceed upon a writ of *venditioni exponas* to sell the goods. * * * In the present case the levy upon the *fieri facias* was made more than a week before the injunction was granted, so that, according to the course of the common law, it ought not to operate as a supersedeas to a *venditioni exponas*."

The position of the sheriff in that case would seem to be strongly analogous to that of the receiver in the case at bar, and it will be noticed that the decision in this case not only permitted the sheriff to remain in possession, but authorized him to proceed to sell the goods. In the case at bar, the writ of supersedeas not only took the property in controversy from the possession of the receiver, but turned it back to the defendants, but it made no provision for the payment of the laborers or other employés upon the work entrusted to him, nor were any means provided for the compensation of the receiver, for the settling of his accounts, or in any manner closing up his trust. It is safe to say that so extraordinary a writ as the writ of supersedeas issued in this case has not before been issued by any court. The United States circuit court of appeals, in its decision in this matter, in endeavoring to justify this unprecedented proceeding, ignores all of the decisions of the Supreme Court of the United States, and loses sight of the difference between supersedeas as understood in the Federal courts and in certain of the State courts, and bases its decision upon the case of State *vs.* Johnson, 13 Fl., 33, which is entirely in conflict with Goddard *vs.* Ordway, *supra*. The State courts,

however, are not uniform, as is shown by the decisions in the following cases:

Bristow *vs.* Home Bldg. Co., 20 S. E., 946 (Va.).
In re Real Estate Assn., 50 Cal., 388.
Swayne *vs.* Townsend, 20 O. St., 1.
Hought *vs.* Irwin, 31 Atl. R., 260 (Pa.).

The effect of supersedeas arising by operation of law in the Federal courts is simply to stay proceedings where they are at the time the supersedeas becomes effective, and this is the supersedeas intended to be covered by Rule 36; and even if it be conceded that a supersedeas by operation of law arose in this case on the 14th of September, 1900, upon the filing of the citation in the district court for the district of Alaska, still the receiver fully complied with all the requirements of such supersedeas. It appears, without denial, that he immediately discharged his men, stopped work upon the mines, the defendants took possession of them, and that the lower court made an order staying the proceedings and providing that the gold that had been extracted from the mines by the receiver should remain in safe-deposit vaults, and that the receiver should not have access thereto.

The Alaska court acted entirely in accordance with the rules governing supersedeas. We have inserted these authorities simply because the court of appeals, in its opinion, has discussed the matter and declined to follow the rule of this court, but has followed that of the supreme court of Florida. This, however, is really immaterial to this controversy for the reason that the receiver here was not charged in the affidavits upon which he was arrested with violating a statutory supersedeas, nor was he convicted by the court of violating a statutory supersedeas, but he was

charged and convicted solely of the violation of the *writs* issued upon the order of Judge Morrow, which *writs*, as we have heretofore shown, were issued entirely without authority of law.

VII.

It will undoubtedly be conceded that, if the writ of supersedeas was void for any of the reasons above stated, petitioner could not be punished for its violation.

This was conceded upon the argument in the court below, and is elementary. Section 725 of the Revised Statutes of the United States, which gives power to punish for contempt, applies to all courts of the United States, and provides that the courts may punish for contempt for the disobedience of their authority by any officer, party, juror, witness, or other person, to any *lawful* writ, process, order, decree, or command.

In *Ex parte* Robinson, 19 Wall., 505, this court had under consideration this statute, and said that the powers and duties of the courts of the United States were limited by the act of Congress. If an order made by a court is simply erroneous, but the court making it has jurisdiction, then the party is not justified in disobeying the order, but should apply to have the order set aside; but if the order is void for want of jurisdiction, disobedience to it is not a contempt.

Harris *vs.* Haines, 35 Mich., 138.
Perry *vs.* Mitchell, 5 Denio, 537.
People *vs.* O'Neal, 47 Cal., 109.
Brown *vs.* Moore, 61 Cal., 432.
In re Norton, 10 Mich., 208.
People *vs.* Sturtevant, 9 N. Y., 263.
Ex parte Grace, 12 Iowa, 208.
State *vs.* Harper's Ferry Bridge Co., 16 W. Va., 64.
Rapalje on Contempt, sec. 16–33.

For the foregoing reasons we respectfully submit that this court should issue its writ of *habeas corpus*, requiring the production of the body of petitioner before it; and should, also, issue a writ of certiorari, addressed to the United States circuit court of appeals for the ninth circuit; and that, upon the hearing of said matters, the petitioner should be discharged.

J. M. WILSON,
T. J. GEARY,
C. A. SEVERANCE,
F. B. KELLOGG,
Attorneys for Petitioner.